

ARIZONA ATTORNEYS  
FOR CRIMINAL JUSTICE  
PO Box 41213  
Phoenix, AZ 85080-1213  
TEL: (480) 812-1700  
Kevin D. Heade, AZ Bar #029909  
[Headek@mail.maricopa.gov](mailto:Headek@mail.maricopa.gov)  
Josephine Bidwill, AZ Bar #031483  
[Josephine@bidwillfirm.com](mailto:Josephine@bidwillfirm.com)

IN THE SUPREME COURT

STATE OF ARIZONA

In the Matter of:

**PETITION TO AMEND RULE 16.4  
OF THE ARIZONA RULES OF  
CRIMINAL PROCEDURE**

Supreme Court No. R-15-0038

**COMMENT OF THE ARIZONA  
ATTORNEYS FOR CRIMINAL  
JUSTICE IN SUPPORT OF  
THE PETITION TO AMEND  
RULE 16.4 OF THE ARIZONA  
RULES OF CRIMINAL  
PROCEDURE**

Pursuant to Rule 28 of the Arizona Rules of Supreme Court, Arizona Attorneys for Criminal Justice (“AACJ”) submits the following comment to the above-referenced petition. AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the

accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

## **I. DISCUSSION**

Over fifty years have passed since the United State Supreme Court announced its decision in *Brady v. Maryland*<sup>1</sup> affirming the Due Process rights of defendants to receive exculpatory information in the possession of prosecutors. This Court has extended *Brady* protections through the adoption of Rule 15.1(b)(8) of the Arizona Rules of Criminal Procedure and Ethical Rule 3.8(d) of the Arizona Rules of Professional Conduct. Recently, this Court amended Rule 24.2 of the Arizona Rules of Criminal Procedure<sup>2</sup> to permit courts to vacate judgments of guilt when the state so requests because the defendant was innocent or because the defendant was convicted based on an erroneous application of the law.

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<sup>1</sup> *Brady v. Maryland*, 373 U.S. 83, 84, 83 S. Ct. 1194, 1195, 10 L. Ed. 2d 215 (1963).

<sup>2</sup> Ariz. R. Crim. P. 24.2(e) (2015).

However, as the petition aptly demonstrates, too many instances have occurred where prosecutors have proceeded to trial while failing to disclose materials or information which tends to mitigate or negate the defendant's guilt.

The local and national news includes many instances of prosecutors either neglecting, willfully ignoring, or failing to understand their *Brady* obligations.<sup>3</sup> Legal scholars, judges, and the members of the general public have criticized courts for failing to hold prosecutors accountable for failing to disclose exculpatory information.<sup>4</sup> It is evident that public confidence in the criminal justice system has been undermined by these known instances of injustice.

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<sup>3</sup> See, e.g. Barnes, Bethany, "Prosecutor secrecy with Evidence, Handling of Witnesses May Tip Balance Away from Justice," LAS VEGAS REVIEW-JOURNAL, Nov. 07, 2015 (available at <http://www.reviewjournal.com/news/las-vegas/prosecutor-secrecy-evidence-handling-witnesses-may-tip-balance-away-justice> ); Balko, Radley, "The Outrageous Conviction of Montez Spradley," WASHINGTON POST, Sept. 21, 2015 (available at <https://www.washingtonpost.com/news/the-watch/wp/2015/09/21/the-outrageous-conviction-of-montez-spradley/> ); "Convictions Overturned, Prosecutors Rebuked: Lawyers Did Not Turn Over Key Evidence in Trial About Struggle with Payson Police," PAYSON ROUNDUP, Dec. 06, 2013 (available at <http://www.paysonroundup.com/news/2013/dec/06/convictions-overturned-prosecutors-rebuked/> ); Fuchs, Erin, "Judge Says Lazy, Unethical Prosecutors Across America are Breaking a Basic Rule," BUSINESS INSIDE., Dec. 11, 2013 (available at <http://www.businessinsider.com/alex-kosinskis-brady-violations-opinion-2013-12> ); Balko, Radly, "*Brady v. Maryland* Turns 50, but Defense Attorneys Aren't Celebrating," HUFFINGTON POST, May 13, 2013 (available at [http://www.huffingtonpost.com/2013/05/13/brady-v-maryland-50\\_n\\_3268000.html](http://www.huffingtonpost.com/2013/05/13/brady-v-maryland-50_n_3268000.html) ); Lewis, Neil, "Judge Berates Prosecutors in Trial of Senator [Ted Stevens]," NEW YORK TIMES, Oct. 02, 2008 (available at <http://www.nytimes.com/2008/10/03/us/03stevens.html> ); Dewan, Shaila. "Duke Prosecutor Jailed; Students Seek Settlement," NEW YORK TIMES, Sept. 08, 2007 (available at <http://www.nytimes.com/2007/09/08/us/08duke.html> ).

<sup>4</sup> See, e.g., Jonathan Abel, Brady's Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team, 67 Stan. L. Rev. 743 (2015); Leonard Sosnov, Brady Reconstructed: An Overdue Expansion of Rights and Remedies, 45 N.M.L. Rev. 171 (2014); Gerard Fowke, Material to Whom?: Implementing Brady's Duty to Disclose at Trial and

The proposed amendment to Rule 16.4 offers a practical and efficient safeguard to non-disclosure of exculpatory information in the possession of the state. The proposal is consistent with existing ethical requirements, promotes judicial economy, and protects the rights of defendants.

Disclosure violations “have reached epidemic proportions in recent years, and the federal and state reporters bear testament to this unsettling trend.”<sup>5</sup> Judge

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During Plea Bargaining, 50 Am. Crim. L. Rev. 575 (2013); Abigail B. Scott, No Secrets Allowed: A Prosecutor's Obligation to Disclose Inadmissible Evidence, 61 Cath. U.L. Rev. 867 (2012); Kate Weisburd, Prosecutors Hide, Defendants Seek: The Erosion of Brady Through the Defendant Due Diligence Rule, 60 UCLA L. Rev. 138 (2012); Cynthia E. Jones, A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence, 100 J. Crim. L. & Criminology 415 (2010); Sara Gurwitch, When Self-Policing Does Not Work: A Proposal for Policing Prosecutors in Their Obligation to Provide Exculpatory Evidence to the Defense, 50 Santa Clara L. Rev. 303 (2010); Bruce A. Green, Beyond Training Prosecutors About Their Disclosure Obligations: Can Prosecutors' Offices Learn from Their Lawyers' Mistakes?, 31 Cardozo L. Rev. 2161 (2010); Daniel S. Medwed, Brady's Bunch of Flaws, 67 Wash. & Lee L. Rev. 1533 (2010); Angela J. Davis, The Legal Profession's Failure to Discipline Unethical Prosecutors, 36 Hofstra L. Rev. 275 (2007); Eugene Cerruti, Through the Looking-Glass at the Brady Doctrine: Some New Reflections on White Queens, Hobgoblins, and Due Process, 94 Ky. L.J. 211 (2006); Susan Bandes, Loyalty to One's Convictions: The Prosecutor and Tunnel Vision, 49 How. L.J. 475 (2006); R. Michael Cassidy, "Soft Words of Hope:" Giglio, Accomplice Witnesses, and the Problem of Implied Inducements, 98 Nw. U.L. Rev. 1129 (2004); Joseph R. Weeks, No Wrong Without A Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence, 22 Okla. City U.L. Rev. 833 (1997); Daniel J. Capra, Access to Exculpatory Evidence: Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review, 53 Fordham L. Rev. 391 (1984).

<sup>5</sup> *United States v. Olsen*, 737 F.3d 625, 631 (9th Cir. 2013) (Kozinski, J., dissenting) (citing *Smith v. Cain*, — U.S. —, 132 S.Ct. 627, 181 L.Ed.2d 571 (2012); *United States v. Sedaghaty*, 728 F.3d 885 (9th Cir.2013); *Aguilar v. Woodford*, 725 F.3d 970 (9th Cir. 2013); *United States v. Kohring*, 637 F.3d 895 (9th Cir. 2010); *Simmons v. Beard*, 590 F.3d 223 (3d Cir.2009); *Douglas v. Workman*, 560 F.3d 1156 (10th Cir. 2009); *Harris v. Lafler*, 553 F.3d 1028 (6th Cir. 2009); *United States v. Zomber*, 299 Fed.Appx. 130 (3d Cir. 2008); *United States v. Triumph Capital Grp., Inc.*, 544 F.3d 149 (2d Cir. 2008); *United States v. Aviles-Colon*, 536 F.3d 1 (1st Cir. 2008); *Horton v. Mayle*, 408 F.3d 570 (9th Cir. 2004); *United States v. Sipe*, 388 F.3d 471 (5th Cir. 2004); *Monroe v. Angelone*, 323 F.3d 286 (4th Cir. 2003); *United States v. Lyons*, 352 F.Supp.2d 1231 (M.D.Fla. 2004); *Watkins v. Miller*, 92 F.Supp.2d 824 (S.D.Ind. 2000) ; *United States v. Dollar*, 25 F.Supp.2d 1320 (N.D.Ala. 1998); *People v. Uribe*, 162

Kozinski, dissenting from the denial of a Petition for Rehearing En Banc, explains that courts have contributed to the problem, “effectively announc[ing] that the prosecution need not produce exculpatory or impeaching evidence so long as it’s *possible* the defendant would’ve been convicted anyway.”<sup>6</sup> This policy creates a dangerous risk that prosecutors will conclude, “when a case is close, it’s best to hide evidence helpful to the defense, as there will be a fair chance reviewing courts will look the other way ....”<sup>7</sup>

Put simply, “Some prosecutors don’t care about *Brady* because courts don’t *make* them care.”<sup>8</sup> The proposed rule makes them care.

The proposed rule change is a low-cost preventive measure which will decrease instances of non-disclosure while also increasing the likelihood of a

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Cal.App.4th 1457, 76 Cal.Rptr.3d 829 (2008); *Miller v. United States*, 14 A.3d 1094 (D.C.2011); *Deren v. State*, 15 So.3d 723 (Fla.Dist.Ct.App. 2009); *Walker v. Johnson*, 282 Ga. 168, 646 S.E.2d 44 (2007); *Aguilera v. State*, 807 N.W.2d 249 (Iowa 2011); *DeSimone v. State*, 803 N.W.2d 97 (Iowa 2011); *Commonwealth v. Bussell*, 226 S.W.3d 96 (Ky. 2007); *State ex rel. Engel v. Dormire*, 304 S.W.3d 120 (Mo. 2010); *Duley v. State*, 304 S.W.3d 158 (Mo.Ct.App.2009); *People v. Garrett*, 106 A.D.3d 929, 964 N.Y.S.2d 652 (N.Y.App.Div. 2013); *Pena v. State*, 353 S.W.3d 797 (Tex.Crim.App. 2011); *In re Stenson*, 174 Wash.2d 474, 276 P.3d 286 (2012); *State v. Youngblood*, 221 W.Va. 20, 650 S.E.2d 119 (2007)).

<sup>6</sup> *Olsen*, 737 F.3d at 630 (emphasis in original).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 631

sanction of a prosecutor's intentional violation of her disclosure obligation.<sup>9</sup> The colloquy would be a brief discussion, possibly including the following questions:<sup>10</sup>

- 1.) Have you reviewed your file, and the notes and file of any prosecutors who handled this case before you, to determine if these materials include information that is favorable to the defense?
- 2.) Have you requested and reviewed the information law enforcement possesses, including information that may not have been reduced to a formal written report, to determine if it contains information that is favorable to the defense?
- 3.) Have you identified information that is favorable to the defense, but nonetheless elected not to disclose this information because you believe that the defense is already aware of the information or the information is not material?
- 4.) Are you aware that this state's rules of professional conduct require you to disclose all information known to the prosecutor that tends to be favorable to the defense regardless of whether the material meets the *Brady* materiality standard?<sup>20</sup>
- 5.) Now that you have conducted pre-trial interviews and have a more complete understanding of the theory of defense, have you reviewed your file to determine if any additional information must be disclosed?

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<sup>9</sup> See, Jason Kreag, The Brady Colloquy, 67 Stan. L. Rev. Online 47, 54 (2014) (asserting that sanctions for non-disclosure are more likely because "if judges conduct a *Brady* colloquy, prosecutors will know that their initial disclosure decision will be at least minimally reviewed and questioned on the record by the court.")

<sup>10</sup> *Id.*

If the prosecutor is unsure whether disclosure of certain materials is necessary, the court could remind the prosecutor that it is willing to conduct an in camera review of the materials.<sup>11</sup>

Requiring the trial court to conduct such a colloquy with the prosecutor to ensure the rights of participants in a criminal proceeding is not unprecedented. Since 1992, Arizona courts have been required to inquire whether the prosecutor has complied with Arizona's Victim's Bill of Rights before a court is permitted to accept a defendant's plea agreement.<sup>12</sup> This colloquy is not an accusation of misconduct on every prosecutor who has extended a plea agreement to a defendant; rather, it is merely a procedural safeguard established to protect the rights of victims in criminal cases.<sup>13</sup>

Similarly, the proposed amendment would require the prosecutor to avow her compliance with the defendant's constitutional, statutory, and procedural rights to exculpatory information which tends to mitigate a defendant's guilt or punishment before the court would permit a criminal case to proceed to trial. The colloquy would promote judicial economy by providing an opportunity for the

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<sup>11</sup> *Id.*

<sup>12</sup> A.R.S. § 13-4423.

<sup>13</sup> *See*, CRIMES—VICTIMS' RIGHTS IMPLEMENTATION ACT, 1991 Ariz. Legis. Serv. Ch. 229, Sec. 2, "Legislative Intent" (H.B. 2412) (West)

court to ensure that the prosecutor understands the scope and extent of her discovery obligations while also confirming that the prosecutor has personally complied with these obligations.

## **II. CONCLUSION**

AACJ supports the proposed amendment because its implementation will protect the rights of defendants, conserve judicial resources, further the interests of justice, and promote public confidence in the Arizona criminal justice system.

RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of May, 2016.

By /s/ Kevin D. Heade  
KEVIN D. HEADE  
AZ Bar # 029909  
Arizona Attorneys for Criminal Justice

By /s/ Josephine Bidwill  
JOSEPHINE BIDWILL  
AZ Bar # 031483  
Arizona Attorneys for Criminal Justice

Electronically filed with the  
Clerk of the Arizona Supreme Court  
this 20<sup>th</sup> day of May, 2016  
by /s/ Kevin D. Heade



